

[CHAPTER X-A
Evidence on Commission at Court's Discretion

Commissions to examine parties and witnesses—Notwithstanding anything contained in Order XXVI of the Code of Civil Procedure, 1908, the Court may, at its discretion, in any suit, at any stage, direct that the parties and witnesses be examined on Commission. The evidence recorded on Commission shall be read as evidence in the suit.]

COMMENTS

It is due to some drastic requirement that Chapter X-A had been incorporated in the Delhi High Court (Original Side) Rules, 1967. We are in agreement with the observations in '*Fashion Linkers*' case on this point. In our view the opinion expressed in *Deepak Kapur's case* that the Rule was merely a proviso or an exception to Order 26 of the Code of Civil Procedure is not the correct view. The beginning part of Chapter X-A clearly states that it is to apply "notwithstanding anything contained in Order 26 of the Code of Civil Procedure". This itself makes it clear that while exercising powers under this Rule the Court is not circumscribed by the limits which are laid down under Order 26 of the Code of Civil Procedure. Under this Rule Court can exercise power even for other reasons i.e. reasons/circumstances not set out in Order 26 CPC, if in its discretion it is necessary to do so. However it is also clear that this Rule does not give to the Court an absolute discretion to refer recording of evidence to a Commissioner without there being any reasons whatsoever. Recording of evidence by the Court has to be the normal rule/procedure. Examination of witnesses on commission has to be an exception. The discretion, vested by virtue of this Rule, has to be exercised judicially and for valid reasons. The Court must while exercising power under this Rule record those reasons in writing. It is also clear that while the Court may exercise the power under this Rule, it cannot by virtue of this Rule delegate any judicial powers to the Commissioner. Thus anything which is required to be dealt with judicially can only be done by the Court and cannot be delegated to the Commissioner. Thus for example the power to allow or disallow questions or to decide objections or to decide relevancy cannot be delegated to a Commissioner. The provisions of Order 26 Rule 16-A of CPC would continue to apply even though the Court may exercise power under Chapter X-A. *Pushpa Devi v. Bimala Devi & Others*, 2000 (52) DRJ 437 : 2000 (2) AD (Delhi) 404.

Appointment of Local Commissioner for recording of evidence—One Division Bench taking a different view from the earlier division bench. Because the question of law involved in earlier Bench was left open, the decision of earlier Division Bench ceased to be binding and the subsequent Division Bench can reconsider the whole matter afresh without referring the same to a larger bench. The decision in *Deepak Kapur v. Ashok K. Ghose*, 1994 (30) DRJ 489 is no longer good law. *Fashion Linkers & others v. Savitri Devi & Anothers*, 1995 (35) DRJ 195 : 1995 (60) DLT 169 : 1995 (4) AD (Delhi) 398.

1. Chapter X-A inserted vide Notification No. 28/Rules/DHC dated 28-2-1991.